

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

In re: Case No. 8:99-bk-18423-PMG
Chapter 7

CAMELOT CASINO CRUISES, INC.,

Debtor.

**ORDER ON OBJECTION TO CLAIM OF
MALCOLM M. BABB
(CLAIM NO. 131)**

THIS CASE came before the Court for hearing to consider the Objection to Claim of Malcolm M. Babb (Claim No. 131). The Objection was filed by Stephen L. Meininger, as Chapter 7 Trustee.

Malcolm M. Babb (Babb) asserts that he is entitled to the allowance of an unsecured claim in the amount of \$540,000.00 for prepetition rent and other charges arising from the Debtor's lease of certain property located in South Carolina.

Stephen L. Meininger, as the Chapter 7 Trustee (the Trustee), objects to Babb's claim on the basis that the lease was never signed and is therefore unenforceable under state law. The Trustee contends that the claim should be disallowed in its entirety.

Background

The Debtor, Camelot Casino Cruises, Inc., was engaged in the business of operating a gambling ship. Its primary asset was a vessel known as the M/V Excalibur.

On or about February 4, 1999, Babb met with two of the Debtor's officers for the purpose of negotiating the terms of the Debtor's lease of certain property from Little River Campground, Inc. and Brenda R. Babb. The property included a pier and dock located in South Carolina that the Debtor proposed to use for berthing the Excalibur. (Proof of Claim No. 131, Exhibit A).

At or about the time of the meeting, Babb and the Debtor's officers contacted Pratt Gasque, an attorney in South Carolina, and asked him to prepare a written lease agreement to document the terms of the parties' understanding (the Lease). (Claim No. 131, Exhibit A).

A check dated February 3, 1999, was written on the Debtor's operating account, and made payable to the Pratt Gasque Trust Account in the amount of \$5,000.00. (Doc. 433, Exhibit C). According to Babb, the check was intended to pay the fees incurred by Gasque for the preparation of the Lease, with the balance of the funds to be applied to the Debtor's obligations under the lease. (Claim No. 131, Exhibit A).

Pursuant to his instructions, Gasque prepared a document entitled "Agreement of Lease." (Claim No. 131, Exhibit A-1). Generally, the Agreement of Lease prepared by Gasque provided that the Debtor would lease certain real property in Little River, South Carolina from Little River Campground, Inc. and Brenda Babb, for an initial term of two years beginning on April 1, 1999, at a minimum annual rental of \$400,000.00, payable at the rate of \$33,333.33 per month. The Agreement of Lease prepared by Gasque also provided that the Debtor was permitted to use the property "for the purpose of berthing and operating a casino cruise ship."

The Agreement of Lease prepared by Gasque was never signed.

On March 28, 1999, Steve Squitiro, an officer of the Debtor, wrote a letter to Babb in which he requested a loan to fund the Debtor's operations. (Doc. 433, Exhibit D). In the letter, Squitiro stated in part:

I am proposing a deal that would be very secure for you and accomplish getting Camelot Casino Cruises operating in Myrtle Beach by May.

If you lend Camelot Casino Cruises \$400,000, we will leave Tarpon Springs and sail out of your dock with the Excaliber [sic]. The ship is currently operating out of Tarpon . . .

Upon agreeing to a deal, we will immediately bring the ship to your dock. You would then transfer \$250,000 to Camelot Casino Cruises to pay for all existing obligations in Tarpon and the start-up expenses in Myrtle Beach. You would pay \$50,000 needed for improvements: dock, clearing property, parking lot, water, electric, office, etc. . . .

...

Our dock deal would remain the same and you would receive \$33,000 per month rent, the first payment coming thirty days after the maiden sail.

...

Please advise us if you have any interest in talking about the possibility of working this deal out.

(Doc. 433, Exhibit D). Babb did not loan \$400,000.00 to the Debtor as requested in the letter. (Claim No. 131, Exhibit A).

On August 1, October 1, November 1, and December 1, 1999, Babb sent written invoices to the Debtor for "past due lease payments" and other charges "pursuant to terms of Lease Agreement." (Babb's Proof of Claim No. 131, Exhibit A-2). The invoices reflect amounts due for lease payments at the rate of \$40,000.00 per month beginning in March of 1999, and also reflect an amount due of \$200,000.00, representing "estimated" charges for dock repair, site work, labor and materials, and permitting.

The Debtor never paid the monthly invoices. (Doc. 406, Trustee's Affidavit, p. 2).

On November 15, 1999, the Debtor filed a petition under Chapter 11 of the Bankruptcy Code.

The Debtor was not in possession of the Excalibur at the time that the bankruptcy petition was filed, because the ship had been arrested by the first mortgage holder. (Doc. 406, p. 2).

The Debtor recovered the ship during the chapter 11. After its recovery, the ship was docked in Clearwater, Florida. (Doc. 406, p. 2).

On or about March 13, 2000, the Debtor sold the ship to Space Coast Cruises pursuant to an Order authorizing the sale entered by the Court.

The ship, the M/V Excalibur, was never docked at Babb's property in South Carolina during the pendency of the Debtor's bankruptcy case. (Doc. 406, p. 2).

On September 7, 2000, Babb filed his Proof of Claim No. 131 in the amount of \$540,000.00. The claims of Brenda R. Babb and Little River Campground, Inc. had been transferred to Babb by virtue of an Assignment of Interest filed on March 6, 2000. (Doc. 65).

Generally, Babb seeks the allowance of an unsecured claim in the amount of \$540,000.00 based on the prepetition Lease of the South Carolina property by the Debtor. It appears that the total claim includes the approximate sum of \$340,000.00 for the rent that was claimed as of the petition date, and the sum of \$200,000.00 for the estimated cost of the site preparation work. (Claim No. 131).

The case was converted to a case under Chapter 7 on June 4, 2001, and Stephen L. Meininger was appointed as Chapter 7 Trustee.

Discussion

The Trustee filed an Objection to Babb's Proof of Claim. (Doc. 408). In the Objection, the Trustee asserts that the "unsigned lease is not binding to the Debtor under the applicable state statute, and the Debtor never occupied the premise of said unsigned lease at any time to entitle the Claimant to any claim."

The validity and enforceability of the Lease is governed by South Carolina law. The property subject to the Lease is in South Carolina, and the proposed Lease drafted by Pratt Gasque provides that the Lease "shall be governed by, construed and enforced in accordance with the laws of the State of South Carolina." (Babb's Proof of Claim No. 131, Exhibit A-1, p. 7).

Section 27-35-20 of the Laws of South Carolina provides as follows:

TITLE 27. PROPERTY AND CONVEYANCES

CHAPTER 35. CREATION, CONSTRUCTION AND TERMINATION OF LEASEHOLD ESTATES

§ 27-35-20. Agreement for more than one year is void unless in writing.

Any agreement for the use or occupation of real estate for more than one year shall be void unless in writing.

S.C.Code Ann. § 27-35-20. Generally, the purpose of such statutes is to protect title to real estate from the uncertainty associated with oral testimony. Empfield v. Kimbrough, 900 P.2d 1153, 1155 (Wyo. 1995).

In this case, the proposed agreement between the Debtor and Babb involved the lease of Babb's real property for an initial term of two years. In other words, it is an "agreement for the use or occupation of real estate for more than one year." The written agreement drafted by Gasque, however, was never signed by the parties. Consequently, the agreement is deemed void in accordance with §27-35-20 of the Laws of South Carolina.

Babb asserts that the South Carolina statute does not apply to the agreement, however, because there are "sufficient writings to document the Lease agreement and sufficient performance by the Debtor in compliance with the terms of the Lease to take this Lease out of the operation of the South Carolina Statute of Frauds." (Doc. 411, p. 2). According to Babb, the documents that evidence the Lease include the check dated February 3, 1999, and Squitiro's letter dated March 28, 1999. The partial performance of the Lease, according to Babb, includes the site preparation work that allegedly occurred at the South Carolina property.

To remove an oral agreement from the operation of §27-35-20 based on a memorandum of the contract, a party must produce a writing that reasonably identifies the subject matter of the agreement, that sufficiently indicates that a contract had been made, and that states the essential terms of the contract with reasonable certainty. Player v. Chandler, 382 S.E.2d 891, 895 (S.C. 1989).

Further, to remove the agreement from the statute based on part performance, the party must establish acts that "relate clearly and unequivocally to the agreement, exclusive of any other relation between the parties touching the agreement." Player v. Chandler, 382 S.E.2d at 894. See also Gibson v. Hryskos, 358 S.E.2d 173, 176 (S.C. Ct. App. 1987).

In this case, the Court finds that the activities that occurred after the meeting in February of 1999 do not establish the existence of a final agreement between the

parties sufficient to remove the Lease from the operation of §27-35-20. On the contrary, the documents and actions indicate that the parties never reached a "meeting of the minds" regarding the terms of the proposed Lease.

First, for example, Babb asserts that the parties agreed at the meeting in February that the initial term of the Lease would commence on March 1, 1999. (Claim No. 131, Exhibit A). The proposed Lease Agreement drafted by Gasque, however, states that the initial term of the Lease would begin on April 1, 1999, and the letter from Squitiro to Babb dated March 29, 1999, states that the first month's rent would be paid "thirty days after the maiden sail." (Babb's Proof of Claim No. 131, Exhibit A-1; Doc. 433, Exhibit D).

Second, Babb asserts (and the draft of the Lease Agreement reflects) that the Debtor was to make rental payments in the minimum amount of \$400,000.00 per year, payable at the rate of \$33,333.33 per month, with a maximum charge of \$600,000.00 per year. The letter from Squitiro to Babb, however, states that Babb would receive rent in the amount of \$33,000 per month, and the invoices that Babb sent to the Debtor beginning in August of 1999 charge the sum of \$40,000.00 per month. (Babb's Proof of Claim No. 131, Exhibit A-2). There is no explanation as to how Babb calculated the \$40,000.00 monthly rent set forth in the invoices.

Third, Babb contends that the check written on the Debtor's operating account in the amount of \$5,000.00 constitutes documentation of the agreement reached by the parties at their meeting on February 4, 1999. The check is actually dated February 3, 1999, however, the day before the meeting occurred. Further, and even more importantly, the check is expressly made payable to Gasque's Trust Account, not to Babb, and Gasque subsequently returned the sum of \$2,250.00 to the Debtor. These factors are inconsistent with Babb's assertion that \$4,500.00 of the \$5,000.00 was intended to represent payment to Babb of the Debtor's obligations under the Lease.

Fourth, Squitiro's letter to Babb dated March 28, 1999, indicates only that the Debtor was considering South Carolina as a base for its future operations. It is clear from the letter, however, that the Debtor did not believe that it was already contractually bound to use and pay rent for Babb's dock.

The Debtor was financially unable to wind up its affairs in Tarpon Springs, where the Excalibur was docked, for example, and to relocate the ship to South

Carolina. Consequently, the purpose of Squitiro's letter was to propose a deal to Babb whereby Babb would fund the exit of the ship from Tarpon Springs and the start-up of the Debtor's operations in South Carolina. According to Squitiro, "I am proposing a deal that would . . . accomplish getting Camelot Casino Cruises operating in Myrtle Beach by May." Further, Squitiro states that the Excalibur would be moved to South Carolina "[u]pon agreeing to a deal."

It appears from the letter that the Debtor regarded the new proposal as a continuation of its earlier negotiations with Babb. Although Squitiro states that the "dock deal would remain the same," the reference does not establish that a "dock deal" had already been concluded. Instead, since the Debtor could not afford to move its ship to South Carolina, it is clear that the Debtor considered the "dock deal" to be only one component of a larger arrangement with Babb that had not been fully negotiated.

Fifth, Babb asserts that the Debtor never disputed the invoices that he submitted to it beginning in August of 1999. Although the Debtor may not have objected to the invoices in writing, it is undisputed that the Debtor did not pay the invoices at the time that they were sent.

Further, the invoices include a charge in the amount of \$200,000.00 that admittedly represents only an "estimated" cost for the site work that would need to be performed to bring the Excalibur to South Carolina. According to Babb, the charge was "based on estimates received from contractors who were to perform the work and the permitting necessary to meet local and state regulations." (Doc. 433, p. 2). The \$200,000.00 charge on the invoices is not supported by any underlying documents showing that any of the site work was actually performed, or that the Debtor was involved in obtaining the estimates or procuring the contractors.

The invoices sent to the Debtor reflect only a unilateral act by Babb to collect money from the Debtor. They do not include any evidence that the Debtor was "performing" under the proposed Lease Agreement with Babb.

The Court has considered all of the post-meeting documents and conduct discussed above, and finds that they do not establish that the parties ever reached a final agreement as to the essential terms of the Lease. Omitted or indefinite terms and conditions include the commencement date of the Lease, the amount of the rent, the time and manner of payment, and the relative

responsibilities for the site improvements and start-up costs. Player v. Chandler, 382 S.E.2d at 893-94. Additionally, no conduct of the Debtor clearly and unequivocally relates to a binding contract between the parties. The Court is satisfied that no final agreement was ever reached, and that negotiations were never completed. Player v. Chandler, 382 S.E.2d at 894-95.

In summary, the proposed Lease Agreement between the Debtor and Babb is deemed void pursuant to the Laws of South Carolina because it was not signed. Further, the documents and actions of the parties after their meeting on February 4, 1999, do not establish that they ever reached a "meeting of the minds" regarding the Lease of Babb's property to the Debtor. The proposed Lease Agreement is not enforceable.

Conclusion

Babb asserts that he is entitled to the allowance of an unsecured claim in the amount of \$540,000.00 for prepetition rent and other charges arising from the Debtor's Lease of certain property located in South Carolina.

The Court finds that Babb's Claim should be disallowed because the Lease Agreement is not in writing as required by South Carolina law, and also because the subsequent documents and actions by the parties do not sufficiently establish that a final agreement was ever reached as to the essential terms of the Lease.

Accordingly:

IT IS ORDERED that:

1. The Objection to Claim of Malcolm M. Babb (Claim No. 131) filed by Stephen L. Meininger, as Chapter 7 Trustee, is sustained.
2. Proof of Claim No. 131 of Malcolm M. Babb is disallowed in its entirety.

DATED this 6th day of July, 2005.

BY THE COURT

/s/ Paul M. Glenn
PAUL M. GLENN
Chief Bankruptcy Judge